

## **E-Filing Policy Issue - # 12**

(E-Service of Subsequent Documents)

**Issue:** (State the issue and whether it is specific to a certain level of court or case type.)

Should e-service of subsequent pleadings (those filed after the initial complaint and prior to judgment) be required between attorneys/ parties? If so, by what authority should this requirement be accomplished?

**Discussion:** (Provide the factual setting or context for the issue.)

Under AO 2009-43, all clerks' offices are required to proceed with electronic distribution of documents as soon as the necessary technology and resources are available to that court. There is no similar requirement that attorneys/parties electronically serve subsequent pleadings upon other attorneys/parties in an action. The AZTurboCourt system could accommodate the technology to carry this out in the statewide application, or this could be accomplished by standard e-mail delivery.

Below are some issues to be considered when addressing e-service of subsequent documents e-filed in a case:

- E-service would result in efficiencies for the entire legal system.
- The transmission of a document by e-service is documented.
- When a party does not respond to the initial complaint, the party's email address will not likely be available for subsequent service.
- Although the State Bar of Arizona is required to maintain a database of the email addresses of AZ attorneys, "to which official court documents may be sent," is the Bar obligated to publicly share the e-mail address e.g. of an attorney who provided an incorrect email address on her pleading?
- Should registration with AZTurboCourt be mandatory for attorneys – using the same email address the attorney supplies to the State Bar?
- How will pro se parties be handled? What happens when a pro se does not have an email address? How will the 1<sup>st</sup> party/attorney to e-serve in the case obtain the e-mail address of those attorneys/parties who have not yet entered an appearance?
- Is personal service ever required by law on a *subsequent* pleading prior to judgment (see Civil Rule 5(c)(4) below for service after judgment)?

- Transition period as e-filing begins (i.e, if e-filing is not yet mandatory does this impact what we do with e-service for that period of time)?

If e-service should occur, it is unclear by what authority and the business process by which it should be carried out. For example, should e-service be required by court rule, by automatic consent of those who use the e-filing system, by agreement among the attorneys/parties in a particular case, by order of the court in a particular case, etc.? At what point in the proceedings should this occur? Can “consent” to receive e-service be withdrawn?

**Authorities:** (Provide references to specific statutes, rules, codes or administrative orders you believe are pertinent to the issue.)

## **Rules of the Supreme Court of Arizona**

### **XII. Miscellaneous Provisions**

#### **Rule 124. Electronic Filing, Delivery and Service of Documents**

**(d) Electronic Delivery of Documents by the Court.** A court may deliver judgments, minute entries, orders requiring the signature of a judge or a clerk to be effective, and notices electronically, instead of by mail, to any party or any party's attorney who files either traditionally or electronically a consent. Such consent is effective in all subsequent litigation in that court involving the consenting party. A party or that party's attorney may withdraw such consent at any time upon notice to the clerk of the court filed either traditionally or electronically. An implementing court may adopt, by appropriate court rule, additional procedures relating to the e-delivery of documents, to the extent such additional procedures are not inconsistent with this Rule 124.

#### **AO 2009-01:**

#### **IT IS FURTHER ORDERED:**

(1) The Clerks of the Superior Court are authorized to distribute minute entries electronically via e-mail if local court technology capabilities permit doing so. Approval is given to each superior court presiding judge and clerk of the superior court to ask the board of supervisors of their respective counties to establish a fee pursuant to the provisions of A.R.S. § 11-251.08 to recover paper minute entry preparation and mailing costs. An attorney wishing to receive paper copies of minute entries may do so only upon paying the fee established by the board of supervisors.

(2) All attorneys, individually or as a firm or office, shall designate and keep current with the State Bar of Arizona, not later than July 1, 2009, an e-mail address to which official court documents may be sent. The Board of Governors, through the Executive Director of the State Bar of Arizona, shall work with the AOC to see that such a system is established

and kept updated. This e-mail address shall be provided with all filings and pleadings on and after July 1, 2009.

**AO 2009-43:**

IT IS ORDERED that:

- (1) The Clerks of the Superior Court are authorized to electronically distribute any document, including minute entries and other orders, rulings, and notices described in Rule 125, Rules of the Supreme Court by e-mail or electronic link in lieu of distribution of paper versions by regular mail.
- (2) The Clerk of the Supreme Court and the Clerks of the Court of Appeals are authorized to electronically distribute any document, including copies of decisions, orders, and case-related notices of all kinds, as well as notices of the filing of opinions, memorandum decisions, and decision orders, by email or electronic link in lieu of distribution of paper versions by regular mail.
- (3) By July 1, 2009, every attorney who files matters into the county superior or state appellate courts, shall designate and maintain an e-mail address to which official court documents will be sent. Attorneys shall include the designated e-mail address on each filing and pleading filed with a county superior or state appellate court. In the event that an attorney's e-mail address changes, the attorney shall indicate that the address is a changed address on subsequent filings and pleadings. In addition to the change of address notice requirements of Rule 5.1(b), Rules of Civil Procedure, each attorney or law firm shall advise the clerk of court and court administrator, in each of the counties in which that attorney or firm has cases pending, of any change to the current designated e-mail address.
- (4) Attorneys filing in the state appellate courts shall receive documents from the court electronically. Attorneys filing matters in Division Two of the Court of Appeals shall register with Division Two's e-filing system via Division Two's website. Once registered, attorneys will receive electronic notifications from Division Two regardless of whether filings are electronic or in paper format.
- (5) For any electronic distribution authorized by this Order, all court rules requiring paper copies of minute entries, orders, opinions, memorandum decisions, decision orders, and notices to be distributed by the court by regular mail, or requiring recipient consent to electronic distribution of court distributed documents, are suspended.
- (6) The provisions of any rule relating to additional time after delivery by regular mail shall apply to documents electronically transmitted.
- (7) All clerks may use an alternative method of delivery if necessary to preserve the security of confidential or sealed documents.

(8) Each superior court presiding judge and clerk of the superior court may ask the board of supervisors of their respective counties to establish a fee schedule pursuant to the provisions of A.R.S. § 11-251.08 to recover preparation, printing, and mailing costs for distributing paper copies of the documents that could be distributed electronically under this Order. An attorney wishing to receive paper copies of documents that could be distributed electronically under this order may do so upon paying the fee established by the board of supervisors.

(9) All clerks' offices shall proceed with electronic distribution of documents as soon as the necessary technology and resources are available.

(10) The Administrative Director of the Courts may give further direction needed to implement this Order as technical issues or exceptional circumstances arise.

## **Rules of Civil Procedure for the Superior Courts of Arizona**

### **II. Commencement of Action; Service of Process, Pleadings, Motions and Orders; Duties of Counsel**

#### **Rule 5. Service and Filing of Pleadings and Other Papers**

##### **Rule 5(a). Service: When Required**

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4, Rule 4.1, or Rule 4.2 as applicable.

##### **Rule 5(c). Service After Appearance; Service After Judgment; How Made**

1) *Serving an Attorney.* If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) Mailing it via U.S. mail to the person's last known address--in which event service is complete upon mailing; or

(D) delivering the paper by any other means, including electronic means, if the recipient consents in writing to that method of service or if the court orders service in that manner--in which event service is complete upon transmission.

(3) *Certificate of Service*. The date and manner of service shall be noted on the original of the paper served or in a separate certificate. If the precise manner in which service has actually been made is not so noted, it will be conclusively presumed that the paper was served by mail. This conclusive presumption shall only apply if service in some form has actually been made.

(4) *Service After Judgment*. After the time for appeal from a judgment has expired or a judgment has become final after appeal, the service of a motion, petition, complaint or other pleading required to be served and requesting modification, vacation or enforcement of that judgment, shall be served pursuant to Rules 4, 4.1 or 4.2, as applicable, of these rules as if serving a summons and complaint.

#### **Rule 5(d). Service; numerous defendants**

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

**Note: ---- and Similar Provisions in Other Sets of Rules. . . .**

#### **ELECTRONIC CASE FILING ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL; IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (12/1/09)**

Registration in the ECF system is mandatory for attorneys. (@ p. 2)

Whenever a document is electronically filed in accordance with these procedures, the ECF system will generate a "Notice of Electronic Filing" (NEF) to the filing party, the assigned judge and any registered user in the case. The NEF will constitute service of the document for purposes of the Federal Rules of Civil, Criminal and Appellate Procedure. Registration as a ECF user constitutes consent to electronic service through the court's transmission facilities. (@ p. 9)

#### **Alternative Solutions:** (List all identified alternative solutions for the issue.)

- Require that anyone who uses AZTurboCourt to e-file a document must accept e-service of subsequent documents, and effectuate this requirement by:
  - court rule,

- the terms of a User Agreement which must be “accepted” at registration,
  - mandatory Terms of Use of AZTurboCourt, or
  - court order in a given case
- Allow the attorneys/parties in any given case to agree to accept e-service of all subsequent documents in that case (and memorialize the agreement by court order).
- Put the impetus of gaining consent on the petitioner. Require the petitioner to maintain records of agreement from the other parties on the case should the issue come into question later in the case.
- Continue with paper service of subsequent documents between attorneys/parties, as contemplated by current court rules, but proceed with e-service of documents by the court as currently permitted/required by court rule and AO.
- Mandate that registration with AZTurboCourt is mandatory for all attorneys so that all e-mail addresses are available in the system.

**Position/Recommendation:** (Does the AOC E-filing team have a recommendation on this issue?)

The AOC E-filing team would prefer to take advantage of the efficiencies for the entire legal system that e-service provides but is unsure how this practice might be effectuated.

**Decision:**

Attorneys filing through AZTurboCourt (in the statewide implementation) must serve other attorneys through AZTurboCourt in subsequent filings which do not require personal service. Electronic service for *pro se* filers will be addressed later.